APPEAL NO. 040143
FILED MARCH 15, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on December 18, 2003. The hearing officer determined that the appellant's (claimant herein) injury did not include a heart attack and cardiovascular disease; that Dr. H was not improperly appointed as the designated doctor; and that the claimant's impairment rating (IR) is 12%. The claimant files a request for review asserting that the hearing officer's resolution of the extent-of-injury issue was contrary to the evidence. The claimant also argues that the hearing officer erred in finding the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in appointing Dr. H as a second designated doctor and erred in giving presumptive weight to his IR certification. The respondent (carrier herein) replies that the hearing officer's decision should be affirmed.

DECISION

Reversed and remanded.

We have held that the question of the extent of an injury is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In the present case, there was simply conflicting evidence concerning the extent of the claimant's injury, and it was the province of the hearing officer to resolve these conflicts. Applying the above standard of review, we find that the hearing officer's

resolution of the extent-of-injury issue was sufficiently supported by the evidence in the record.

The claimant argues that Dr. H was improperly appointed as the designated doctor in this case because Dr. O had been originally appointed as the designated doctor, and that there was not a proper basis to choose a second designated doctor in this case. The hearing officer found that the Commission did not abuse its discretion in appointing Dr. H as a designated doctor because Dr. O failed to respond to a request for clarification from the Commission. While we have noted that appointment of a second designated doctor should be rare, we have also found that a basis for appointing a second designated doctor is the failure of the designated doctor to cooperate by failing to respond to a Commission request for clarification. *See* Texas Workers' Compensation Commission Appeal No. 012634, decided December 12, 2001.

The claimant also contends that Dr. H's appointment as a designated doctor was improper because the hearing officer failed to review whether the claimant's injury was within Dr. H's scope of practice, citing to Texas Workers' Compensation Commission Appeal No. 030737-s, decided May 14, 2003, and to Texas Workers' Compensation Commission Appeal No. 031015, decided June 9, 2003. Since the hearing officer found that the claimant's injury did not include heart attack or cardiovascular disease, it is not relevant whether or not treatments of these conditions was within Dr. H's scope of practice. However, the claimant had undergone spinal surgery and, therefore, it is unclear whether or not the claimant's compensable injury is within the scope of practice of Dr. H, who, according to evidence in the record, although not well-developed, is an osteopath in family practice.

The carrier argues that the issue of whether or not the claimant's compensable injury was within Dr. H's scope of practice was not raised at the CCH. This is quite simply a misstatement of the record. The claimant's attorney states as follows at the CCH:

> [Dr. H] is a doctor of osteopathic medicine practicing family medicine. We would assert that if a second designated doctor needs to be appointed, it needs to be with a doctor who in his practice performs back surgeries and cardiac evaluations, if the cardiac condition is included, or refers them to a cardiac opinion. [Tr. at 51.]

Since the hearing officer did not address the issue of whether or not Dr. H was qualified to be a designated doctor, we must reverse and remand the case to him, to develop the evidence and make findings regarding this. Should he determine that Dr. H is not qualified, a qualified designated doctor will need to be appointed. The issue of IR will obviously turn on what happens regarding the issue of the designated doctor.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision

must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **HARTFORD UNDERWRITERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

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Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

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Chris Cowan
Appeals Judge